SUPREME COURT, U. S.

FILED

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2059

WILLIAM GEORGE BROGE, EUGENE MOBLEY, FREDDIE WALDEN and JIM TRENT,
Appellants,

vs.

STATE OF FLORIDA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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In the Supreme Court of the United States

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WILLIAM GEORGE BROGE, EUGENE MOBLEY, FREDDIE WALDEN and JIM TRENT,
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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners request issuance of a Writ of Certiorari to the Florida Supreme Court and show in support of this petition as follows:

JURISDICTION

This is a criminal case in which the Petitioners were convicted of felonies. Petitioners appealed to the Fourth District Court of Appeal, State of Florida which affirmed (A1). Petitioners filed a Petition for Certiorari in the Florida Supreme Court which was denied on April 30, 1974 (A4), and a timely petition for rehearing was denied on June 22, 1974 (A5).

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE FLORIDA COURTS ERRED IN APPLYING A SUFFICIENCY OF THE EVIDENCE TEST TO DETERMINE WHETHER HARMFUL ERROR OCCURRED IN A CRIMINAL CASE INVOLVING THE VIOLATION OF A FEDERAL CONSTITUTIONAL RIGHT.

2. WHETHER DEFENDANTS' RIGHT TO BE CONFRONTED WITH WITNESSES AND TO CROSS-EXAMINE THEM WAS VIOLATED WHEN THE STATE PROSECUTOR WAS PERMITTED, IN CLOSING ARGUMENTS, TO COMMENT ON MATTERS OUTSIDE OF THE RECORD INVOLVING THE STATE'S WITNESSES, DEFENSE COUNSEL, AND THE PROSECUTOR'S PERSONAL BELIEF AS TO THE MERITS OF THE CASE.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution guarantees the right of an accused to confront the witnesses against him and cross-examine them. The Fourteenth Amendment imposes the Sixth Amendment on the States.

STATEMENT OF THE CASE

Petitioners were convicted of various felony riot charges which arose out of a labor union dispute in Palm Beach County, Florida. Sentences of imprisonment from two to five years were imposed on the Defendants. During the trial and in closing argument the State Prosecutor made the following statements about his witnesses, what

defense counsel has done in other cases, and his personal beliefs, none of which were part of the record. The right of cross-examination of this "testimony" was not given the Defendants.

> "Mr. Starr has come up before you in his argument and indicated to you that it was his duty as a lawyer to protect his clients and proceed in that manner. He has cried here, which he cries in every criminal case.
>
> I am sorry to disappoint you if you thought you were singled out for the honor, but he cries in every criminal case. * * * (A6).
>
> In this and every single case Mr. Starr and I have handled, the police have always lied (A6).
>
> In every case the police have lied. They come into Court and testify from the witness stand and they lie. * * * (A6).
>
> I submit that I cannot understand this accusation against the men that you saw in here, the finest bunch of young men I have seen with the Sheriff's Department since I have been here." * * * (A7).

After discussing in his closing argument the allegation by Defense Counsel that prosecuting witnesses were not telling the truth, the prosecutor stated:

> * * * "I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that." (A8).

Defendants' conviction was appealed to the Fourth District Court of Appeal of the State of Florida which affirmed, writing a decision in which the court made it perfectly clear that the remarks of the prosecutor were improper and should not have occurred. The court ap-

parently found that the erroneous remarks did not constitute harmful error. The court noted in the first paragraph that the Petitioners did not challenge the sufficiency of the evidence on appeal, and went on to quote from *Henderson* v. *State*, 113 So. 689 (Fla. 1927), as follows:

> ". . . we cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would indeed, be a dangerous precedent."

The Court then went on to remind attorneys that these remarks are improper, but affirmed "finding no error requiring reversal * * *".

The Florida Supreme Court denied a Petition for Certiorari without writing an opinion.

REASONS FOR ALLOWANCE OF WRIT

The Sixth Amendment of the United States Constitution clearly guarantees a Defendant in a criminal case the right to be confronted by the witnesses against him which includes the right of cross-examination. States are obliged to follow the same procedure under the Fourteenth Amendment.

> "The sixth amendment right of an accused to confront the witnesses against him is a fundamental right and is made obligatory on the states by the fourteenth amendment. The right to be confronted with the wit-

nesses against him includes the right to cross-examine those witnesses. The right of an accused to be confronted with witnesses against him must be determined by the same standards in both Federal and State proceedings." *Pointer* v. *State of Texas*, 380 U.S. 400, 13 L.Ed.2d 923, 85 S.Ct. 1065 (1965).

In the present case the prosecutor expressed his personal opinion and belief as to the veracity of the testimony of his witnesses, told the jury that defense counsel makes the same argument and uses the same tactics in other cases which they have tried together, and "testified" that police officers testifying on behalf of the State were "the finest bunch of young men I have ever seen with the Sheriff's Department since I have been here".

The prosecutor is of course an officer of the Court and is also a public official. It can be presumed that the jury gave great weight to his "testimony" even though it was unsworn. His statements bore directly on the issue of ultimate guilt or innocence of the Defendants.

The Fourth District Court of Appeal did not discuss all of the remarks which form the basis of this writ, holding the most serious to be the expression of personal belief by the prosecutor in the merits of the case, and finding the error not to be of a reversible nature. A reading of the opinion of the Fourth District Court of Appeal makes it clear that the Court was of the opinion that in light of the evidence and the sufficiency of it no error was shown. This is not the proper criterion for review of criminal cases where a violation of a constitutional right exists in any court. This Court held in *Chapman* v. *California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), that "before a federal constitutional error can be held harmless" there must be a finding that it was "harmless beyond a reasonable doubt". In the *Chapman*

case the California Supreme Court applied a test on the appeal which found error to be harmless unless it produced a miscarriage of justice. This Court reversed the *Chapman* decision holding that the issue must be whether the error was harmless beyond a reasonable doubt.

In view of the foregoing it is respectfully submitted that the Petition for Certiorari should be granted.

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Attorneys for Appellants
By LARRY KLEIN

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that copy of the foregoing has been furnished by mail this 19th day of July, 1974, to the State's Attorneys Office, Palm Beach County Courthouse, West Palm Beach, Florida and the Office of The Attorney General, Pan American Building, West Palm Beach, Florida.

LARRY KLEIN

APPENDIX

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JULY TERM 1973

CASE NOS. 72-399, 72-400, 72-401 and 72-402.

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,
Appellants,

v.

STATE OF FLORIDA,
Appellee.

Opinion filed January 8, 1974.

Appeal from the Circuit Court for
Palm Beach County;
Vaughn J. Rudnick, Judge.

Larry Klein of Cone Wagner Nugent
Johnson & McKeown, West Palm
Beach, for appellants.

Robert L. Shevin, Attorney General,
Tallahassee, and Nelson E. Bailey,
Assistant Attorney General, West
Palm Beach, for appellee.

FERRIS, JOHN G., Associate Judge.

Following a five weeks jury trial, appellants were convicted on various felony riot charges which stemmed from a labor dispute. Appellants do not challenge the

sufficiency of the evidence but complain mainly of improper remarks and statements of the prosecutor. The most serious instance occurred during final argument when the prosecutor said:

> "If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that."

While the quoted comment, even though ambiguous, seems to be relaying the prosecutor's personal belief on the believability of portions of the evidence, it is of course lifted out of context of the entire argument and its relationship to argument of defense counsel. In his closing argument, defense counsel castigated the testimony of the policemen who testified, commenting on the "false testimony" and "bold lies" of these witnesses. He accused the prosecution of "buying" evidence and knowing that the police officers had deliberately lied in this case. In rebutting those comments and others, the prosecutor advised the jury that if they believed those accusations as to the testimony of the police officers they should immediately find the defendants not guilty and then made the comment above quoted.

The Supreme Court was faced with a similar situation in Henderson v. State, Fla. 1927, 113 So. 689, and, after reviewing the alleged improper remarks and the arguments of the defense which preceded them, said:

> ". . . we cannot afford to lay down a rule here which would make it hereafter possible for an attorney for the defendant in any hard fought criminal case to

deliberately goad the state's attorney, by unfounded or improper charges and insinuations, into heated, indiscreet, and improper reply, and to then use such reply to secure a reversal of the case, regardless of the sufficiency of the evidence, thus enabling him to take advantage of his own wrong. This would indeed, be a dangerous precedent."

We find that the comment complained of was induced by, and was in fair rebuttal to, the repeated personal expressions by defense counsel as to veracity of certain witnesses and to the complicity of the state in offering known perjured testimony. The defendants cannot therefore be heard to complain in these circumstances.

Both prosecution and defense attorneys are reminded that, though a prolonged and hotly contested criminal jury trial will occasionally produce emotional remarks and replies, they are both under a continuing duty to refrain from improper remarks which may well prompt other improper remarks in retaliation. Disciplinary Rule DR 7-106(C)(4) of the Code of Professional Responsibility of the Florida Bar enjoins all trial counsel from asserting:

". . . his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein."

Finding no error requiring reversal, the judgments of conviction in each case are AFFIRMED.

WALDEN and MAGER, JJ., concur.

SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1974

TUESDAY, APRIL 30, 1974

CASE NO. 45,147

DISTRICT COURT OF APPEAL, FOURTH DISTRICT
72-399, 72-400, 72-401, 72-402

WILLIAM GEORGE BROGE, EUGENE MOBLEY,
FREDDIE WALDEN and JIM TRENT,
Petitioners,

vs.

STATE OF FLORIDA,
Respondent.

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4 5 c (6), and it appearing to the Court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

ADKINS, C.J., ROBERTS, ERVIN, BOYD and McCAIN, JJ., concur

Y

CC: Hon. E. J. Comiskey, Clerk
Hon. John B. Dunkle, Clerk
Hon. Vaughn J. Rudnick, Judge
Cone, Wagner, Nugent, Johnson & McKeown
(Hon. Larry Klein)
Office of State Attorney,
West Palm Beach
Hon. George Georgieff
Hon. Basil S. Diamond

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 1974

CASE NO. 72-399 & 72-400 & 72-401 & 72-402.

WILLIAM GEORGE BROGE, et al.
Appellant

v.

STATE OF FLORIDA
Appellee

FEBRUARY 8, 1974

ORDERED that Appellants' Petition for Rehearing, filed January 21, 1974, is hereby denied.

cc: Cone Wagner Nugent Johnson & McKeown
State Attorneys Office
Attorney General's Office

* * * it is a two week case.

This case has been delayed and dragged out to an interminable and unconscionable length and was dragged and dragged and dragged out. The State put on thirty-five witnesses on the stand here. Most of the direct examination of these witnesses lasted five, ten, fifteen, twenty, twenty-five minutes at the most and cross examination took hours. Hours.

Mr. Starr has come up before you in his argument and indicated to you that it was his duty as a lawyer to protect his clients and proceed in that manner. He has cried here, which he cries in every criminal case.

I am sorry to disappoint you if you thought you were singled out for the honor, but he cries in every criminal case. Mr. Starr has had a history of root canal work which invariably pops up on the selection of jurors in his inability to speak.

He has diabetes and is not a well man, I will vouch for that, and it is an unhappy circumstance that he has that. He cross examined to the enth degree, but in any case, it is not anything particularly new in this particular case. He will argue the full time requirements he has so you will be set for another hour and a half on final argument.

In this and every single case Mr. Starr and I have handled, the police have always lied.

MR. STARR: We object to this and ask the Reporter to take the argument. It is not a proper comment.

THE COURT: I thought the Reporter is taking the final argument. He indicates he is, Counselor.

MR. STARR: Thank you.

THE COURT: The objection is noted and overruled.

MR. T. BROWN: In every case the police have lied. They come into Court and testify from the witness stand and they lie.

Now the role of an attorney, and quite frankly I am unhappy to be an attorney in this particular case, and I * * * delay is in the interest of a fair trial for his client is not true, because the delay is to convey to the jury, to have them forget the evidence and testimony and to confuse the issue with so many facts that you forget what we are doing here and forget what the evidence in the case is.

We have been delayed now five weeks on a two week trial.

MR. GROSS: I will object to that statement, Your Honor. We have not been delayed, and we will ask the Court to advise counsel for the State to argue the facts and the evidence and limit his argument to that, please, sir.

MR. T. BROWN: Your Honor, I claim my right here of fair play. He mentioned it in his opening statement and I claim my right of fair play.

THE COURT: Objection overruled.

MR. T. BROWN: The delay here must be attributable to one side or the other.

Let me say this: Mr. Starr, it is apparent, believes the police lied. He believes that implicitly. I submit to you when he tells you that, he believes that in his heart that the police lied.

I submit that I cannot understand this accusation against the men that you saw in here, the finest bunch of young men I have seen with the Sheriff's Department since I have been here. I have been with the Solicitor's office for four and a half years and this case was purposely set on June 21st because I am leaving the office and this is the last case I intend to try here. Mr. Mounts has my notice and has had it for some time. I submit that is it for me in the criminal practice as a prosecutor.

I would like you to understand this and I ask your indulgence and I ask you to listen carefully and do what

I ask you to do, if it is in your conscience. Mr. Starr made the accusation against these young men that they came in here and lied against these defendants here on trial. He said they got together and fabricated the evidence.

The worst thing that anyone can do from the witness stand against individuals is to falsely accuse them to see that they are convicted. This is what he said all the way and it is no secret that he accuses the State and myself of suborning perjury. When I sit there as the State's prosecutor and allow them to perjure themselves, that is suborning perjury in this case.

Let me say this: If you believe as you sit right here now that this is what occurred in this particular case, if you believe those police officers came in here and fabricated the stories which they told in regard to this defendants, then please do not consider the evidence in this particular case. When you go back to the jury room after you have been instructed by the Court on the law, do not consider the evidence, do not go any farther, just sign all the not guilty verdicts and return them and go home. Because this is what a jury is for. A jury is for the protection of free men in our society and that is your duty.

If you consciously believe this case has been handled improperly by the State or by the Court, do it. Don't feel badly about it. My duty, as I told you, is to see that these defendants get a fair trial and that is your duty also. I cannot believe under any stretch of the imagination, under any of these interpretations of these facts in this case, that you can believe that.

MR. STARR: We object to the personal belief of the prosecutor and we believe those are grounds for mistrial and we make that motion for mistrial on his personal belief.

THE COURT: The objection is overruled and the motion for mistrial is denied.

Counsel is commenting on the evidence.

MR. T. BROWN: I want to discuss the evidence in this case for the first time. Mr. Starr did not see fit to discuss the evidence. I don't believe you will find from the evidence that that occurred at all.

It seems to me that maybe I better * * *.